

# **OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: REVIEW 2000**

## **COMMENTARIES**

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*These commentaries have been prepared by the CIME to provide information on and explanation of the Guidelines text and of the Council Decision on Implementation of the Guidelines. They are not intended to be part of the Declaration on International Investment and Multinational Enterprises or of the Council Decision on the Guidelines for Multinational Enterprises.*

## TABLE OF CONTENTS

COMMENTARY ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES.....	3
Commentary on General Policies.....	3
Commentary on Disclosure.....	5
Commentary on Employment and Industrial Relations .....	6
Commentary on the Environment .....	8
Commentary on Combating Bribery.....	10
Commentary on Consumer Interests.....	10
Commentary on Science and Technology.....	11
Commentary on Competition.....	12
Commentary on Taxation.....	13
COMMENTARY ON THE IMPLEMENTATION PROCEDURES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES .....	14

## COMMENTARY ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

### Commentary on General Policies

1. The General Policies chapter of the *Guidelines* is the first to contain specific recommendations to enterprises. As such it is important for setting the tone and establishing common fundamental principles for the specific recommendations in subsequent chapters.

2. Obeying domestic law is the first obligation of business. The *Guidelines* are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises. While the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.

3. Enterprises are encouraged to co-operate with governments in the development and implementation of policies and laws. Considering the views of other stakeholders in society, which includes the local community as well as business interests, can enrich this process. It is also recognised that governments should be transparent in their dealings with enterprises, and consult with business on these same issues. Enterprises should be viewed as partners with government in the development and use of both voluntary and regulatory approaches (of which the *Guidelines* are one element) to policies affecting them.

4. There should not be any contradiction between the activity of multinational enterprises (MNEs) and sustainable development, and the *Guidelines* are meant to foster complementarities in this regard. Indeed, links among economic, social, and environmental progress are a key means for furthering the goal of sustainable development.<sup>1</sup> On a related issue, while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments' international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.

5. The *Guidelines* also acknowledge and encourage the contribution that MNEs can make to local capacity building as a result of their activities in local communities. Similarly, the recommendation on human capital formation is an explicit and forward-looking recognition of the contribution to individual human development that MNEs can offer their employees, and encompasses not only hiring practices, but training and other employee development as well. Human capital formation also incorporates the notion of non-discrimination in hiring practices as well as promotion practices, life-long learning and other on-the-job training.

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1. One of the most broadly accepted definitions of sustainable development is in the 1987 World Commission on Environment and Development (the Brundtland Commission): "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

6. Governments recommend that, in general, enterprises avoid efforts to secure exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation and financial incentives among other issues, without infringing on an enterprise's right to seek changes in the statutory or regulatory framework. The words "or accepting" also draw attention to the role of the state in offering these exemptions. While this sort of provision has been traditionally directed at governments, it is also of direct relevance to MNEs. Importantly, however, there are instances where specific exemptions from laws or other policies can be consistent with these laws for legitimate public policy reasons. The environment and competition policy chapters are examples.

7. The paragraph devoted to the role of MNEs in corporate governance gives further impetus to the recently adopted OECD Principles of Corporate Governance. Although primary responsibility for improving the legal and institutional regulatory framework lies with governments, enterprises also have an interest in good governance.

8. An increasing network of non-governmental self-regulatory instruments and actions address aspects of corporate behaviour and the relationships between business and society. Enterprises recognise that their activities often have social and environmental implications. The institution of self-regulatory practices and management systems by enterprises sensitive to reaching these goals - thereby contributing to sustainable development - is an illustration of this. In turn, developing such practices can further constructive relationships between enterprises and the societies in which they operate.

9. Following from effective self-regulatory practices, as a matter of course, enterprises are expected to promote employee awareness of company policies. Safeguards to protect *bona fide* "whistle-blowing" activities are also recommended, including protection of employees who, in the absence of timely remedial action or in the face of reasonable risk of negative employment action, report practices that contravene the law to the competent public authorities. While of particular relevance to anti-bribery and environmental initiatives, such protection is also relevant to other recommendations in the *Guidelines*.

10. Encouraging, where practicable, compatible principles of corporate responsibility among business partners serves to combine a re-affirmation of the standards and principles embodied in the *Guidelines* with an acknowledgement of their importance to suppliers, contractors, subcontractors, licensees and other entities with which MNEs enjoy a working relationship. It is recognised that there are practical limitations to the ability of enterprises to influence the conduct of their business partners. The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise vis-à-vis its suppliers or other business partners. The influence enterprises may have on their suppliers or business partners is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners. Thus, the scope for influencing business partners and the supply chain is greater in some instances than in others. Established or direct business relationships are the major object of this recommendation rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships. In cases where direct influence of business partners is not possible, the objective could be met by means of dissemination of general policy statements of the enterprise or membership in business federations that encourage business partners to apply principles of corporate conduct compatible with the *Guidelines*.

11. Finally, it is important to note that self-regulation and other initiatives in a similar vein, including the *Guidelines*, should not unlawfully restrict competition, nor should they be considered a substitute for effective law and regulation by governments. It is understood that MNEs should avoid potential trade or investment distorting effects of codes and self-regulatory practices when they are being developed.

## Commentary on Disclosure

12. The purpose of this chapter is to encourage improved understanding of the operations of multinational enterprises. Clear and complete information on enterprises is important to a variety of users ranging from shareholders and the financial community to other constituencies such as employees, local communities, special interest groups, governments and society at large. To improve public understanding of enterprises and their interaction with society and the environment, enterprises should be transparent in their operations and responsive to the public's increasingly sophisticated demands for information. The information highlighted in this chapter may be a supplement to disclosure required under the national laws of the countries in which the enterprise operates.

13. This chapter addresses disclosure in two areas. The first set of disclosure recommendations is identical to disclosure items outlined in the *OECD Principles of Corporate Governance*. The *Principles* call for timely and accurate disclosure on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company. Companies are also expected to disclose sufficient information on the remuneration of board members and key executives (either individually or in the aggregate) for investors to properly assess the costs and benefits of remuneration plans and the contribution of incentive schemes, such as stock option schemes, to performance. The *Principles* contain annotations that provide further guidance on the required disclosures and the recommendations in the *Guidelines* should be construed in relation to these annotations. They focus on publicly traded companies. To the extent that they are deemed applicable, they should also be a useful tool to improve corporate governance in non-traded enterprises; for example, privately held and state owned enterprises.

14. The *Guidelines* also encourage a second set of disclosure or communication practices in areas where reporting standards are still emerging such as, for example, social, environmental, and risk reporting. Many enterprises provide information on a broader set of topics than financial performance and consider disclosure of such information a method by which they can demonstrate a commitment to socially acceptable practices. In some cases, this second type of disclosure -- or communication with the public and with other parties directly affected by the firms' activities -- may pertain to entities that extend beyond those covered in the enterprises' financial accounts. For example, it may also cover information on the activities of subcontractors and suppliers or of joint venture partners.

15. Many enterprises have adopted measures designed to help them comply with the law and standards of business conduct, and to enhance the transparency of their operations. A growing number of firms have issued voluntary codes of corporate conduct, which are expressions of commitments to ethical values in such areas as environment, labour standards or consumer protection. Specialised management systems are being developed with the aim of helping them respect these commitments -- these involve information systems, operating procedures and training requirements. Enterprises are co-operating with NGOs and intergovernmental organisations in developing reporting standards that enhance enterprises' ability to communicate how their activities influence sustainable development outcomes (e.g. the Global Reporting Initiative).

16. The *OECD Principles of Corporate Governance* support the development of high quality internationally recognised standards of accounting, financial and non-financial disclosure, and audit, which can serve to improve the comparability of information among countries. Financial audits conducted by independent auditors provide external and objective assurance on the way in which financial statements have been prepared and presented. The transparency and effectiveness of non-financial disclosure may be enhanced by independent verification. Techniques for independent verification of non-financial disclosure are emerging.

17. Enterprises are encouraged to provide easy and economical access to published information and to consider making use of information technologies to meet this goal. Information that is made available to users in home markets should also be available to all interested users. Enterprises may take special steps to make information available to communities that do not have access to printed media (e.g. poorer communities that are directly affected by the enterprise's activities).

18. Disclosure requirements are not expected to place unreasonable administrative or cost burdens on enterprises. Nor are enterprises expected to disclose information that may endanger their competitive position unless disclosure is necessary to fully inform the investment decision and to avoid misleading the investor.

### **Commentary on Employment and Industrial Relations**

19. This chapter opens with a chapeau that includes a reference to "applicable" law and regulations, which is meant to acknowledge the fact that multinational enterprises, while operating within the jurisdiction of particular countries, may be subject to *national*, *sub-national*, as well as *supra-national* levels of regulation of employment and industrial relations matters. The terms "prevailing labour relations" and "employment practices" are sufficiently broad to permit a variety of interpretations in light of different national circumstances - for example, different bargaining options provided for employees under national laws and regulations.

20. The International Labour Organisation (ILO) is the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work of the International Labour Organisation (ILO). The *Guidelines*, as a non-binding instrument, have a role to play in promoting observance of these standards and principles among multinational enterprises. The provisions of the *Guidelines* chapter echo relevant provisions of the 1998 Declaration, as well as the ILO's 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The Tripartite Declaration sets out principles in the fields of employment, training, working conditions, and industrial relations, while the OECD Guidelines cover all major aspects of corporate behaviour. The OECD Guidelines and the ILO Tripartite Declaration refer to the behaviour expected from enterprises and are intended to parallel and not conflict with each other. The ILO Tripartite Declaration can therefore be of use in understanding the *Guidelines* to the extent that it is of a greater degree of elaboration. However, the responsibilities for the follow-up procedures under the Tripartite Declaration and the *Guidelines* are institutionally separate.

21. The first paragraph of this chapter is designed to echo all four fundamental principles and rights at work which are contained in the ILO's 1998 Declaration, namely the freedom of association and right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour, and non-discrimination in employment and occupation. These principles and rights have been developed in the form of specific rights and obligations in ILO Conventions recognised as fundamental.

22. The chapter recommends that multinational enterprises contribute to the effective abolition of child labour in the sense of the ILO 1998 Declaration and ILO Convention 182 concerning the worst forms of child labour. Long-standing ILO instruments on child labour are Convention 138 and Recommendation 146 (both adopted in 1973) concerning minimum ages for employment. Through their labour management practices, their creation of high quality, well paid jobs and their contribution to economic growth, multinational enterprises can play a positive role in helping to address the root causes of poverty in general and of child labour in particular. It is important to acknowledge and encourage the role of multinational

enterprises in contributing to the search for a lasting solution to the problem of child labour. In this regard, raising the standards of education of children living in host countries is especially noteworthy.

23. The chapter also recommends that enterprises contribute to the elimination of all forms of compulsory labour, another principle derived from the 1998 ILO Declaration. The reference to this core labour right is based on the ILO Conventions 29 of 1930 and 105 of 1957. C. 29 requests that governments “suppress the use of forced or compulsory labour in all its forms within the shortest possible period”, while C. 105 requests of them to “suppress and not to make use of any form of forced or compulsory labour” for certain enumerated purposes (e.g. as a means of political coercion or labour discipline), and “to take effective measures to secure [its] immediate and complete abolition”. At the same time, it is understood that the ILO is the competent body to deal with the difficult issue of prison labour, in particular when it comes to the hiring-out of prisoners to (or their placing at the disposal of) private individuals, companies or associations.

24. The principle of non-discrimination with respect to employment and occupation is considered to apply to such terms and conditions as hiring, discharge, pay, promotion, training and retirement. The list of non-permissible grounds for discrimination which is taken from ILO Convention 111 of 1958 considers that any distinction, exclusion or preference on these grounds is in violation of the Convention. At the same time, the text makes clear that the terms do not constitute an exhaustive list. Consistent with the provisions in paragraph 1d), enterprises are expected to promote equal opportunities for women and men with special emphasis on equal criteria for selection, remuneration, and promotion, and equal application of those criteria, and prevent discrimination or dismissals on the grounds of marriage, pregnancy or parenthood.

25. The reference to consultative forms of employee participation in paragraph two of the *Guidelines* is taken from ILO Recommendation 94 of 1952 concerning Consultation and Co-operation between Employers and Workers at the Level of the Undertaking. It also conforms to a provision contained in the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Such consultative arrangements should not substitute for employees’ right to bargain over terms and conditions of employment. A recommendation on consultative arrangements with respect to employment arrangements is also part of paragraph eight.

26. In paragraph three of this chapter, information provided by companies to their employees is expected to provide a “true and fair view” of performance. It relates to the following: the structure of the enterprise, its economic and financial situation and prospects, employment trends, and expected substantial changes in operations, taking into account legitimate requirements of business confidentiality. Considerations of business confidentiality may mean that information on certain points may not be provided, or may not be provided without safeguards.

27. In paragraph four, employment and industrial relations standards are understood to include compensation and working-time arrangements. The reference to occupational health and safety implies that MNEs are expected to follow prevailing regulatory standards and industry norms to minimise the risk of accidents and injury to health arising out of, linked with, or occurring in, the course of employment. This encourages enterprises to work to raise the level of performance with respect to occupational health and safety in all parts of their operation even where this may not be formally required by existing regulations in countries in which they operate. It also encourages enterprises to respect employees’ ability to remove themselves from a work situation when there is reasonable justification to believe that it presents an imminent and serious risk to health or safety. Reflecting their importance and complementarities among related recommendations, health and safety concerns are echoed elsewhere in the *Guidelines*, most notably in chapters on Consumer Interests and the Environment.

28. The recommendation in paragraph five of the chapter encourages MNEs to recruit an adequate workforce share locally, including managerial personnel, and to provide training to them. Language in this paragraph on training and skill levels complements the text in paragraph four of the General Policies chapter on encouraging human capital formation. The reference to local personnel complements the text encouraging local capacity building in paragraph three of the General Policies chapter.

29. Paragraph six recommends that enterprises provide reasonable notice to the representatives of employees and relevant government authorities, of changes in their operations which would have major effects upon the livelihood of their employees, in particular the closure of an entity involving collective layoffs or dismissals. As stated therein, the purpose of this provision is to afford an opportunity for co-operation to mitigate the effects of such changes. This is an important principle that is widely reflected in the industrial relations laws and practices of adhering countries, although the approaches taken to ensuring an opportunity for meaningful co-operation are not identical in all adhering countries. The paragraph also notes that it would be appropriate if, in light of specific circumstances, management were able to give such notice prior to the final decision. Indeed, notice prior to the final decision is a feature of industrial relations laws and practices in a number of adhering countries. However, it is not the only means to ensure an opportunity for meaningful co-operation to mitigate the effects of such decisions, and the laws and practices of other adhering countries provide for other means such as defined periods during which consultations must be undertaken before decisions may be implemented.

### **Commentary on the Environment**

30. The text of the Environment Chapter broadly reflects the *principles* and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration). It also takes into account the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters and reflects *standards* contained in such instruments as the ISO Standard on Environmental Management Systems.

31. Sound environmental management is an important part of sustainable development, and is increasingly being seen as both a business responsibility and a business *opportunity*. Multinational enterprises have a role to play in both respects. Managers of these enterprises should therefore give appropriate attention to environmental issues within their business strategies. Improving environmental performance requires a commitment to a systematic approach and to continual improvement of the system. An environmental management system provides the internal framework necessary to control an enterprise's environmental impacts and to integrate environmental considerations into business operations. Having such a system in place should help to assure stockholders, employees and the community that the enterprise is actively working to protect the environment from the impacts of its activities.

32. In addition to improving environmental performance, instituting an environmental management system can provide economic benefits to companies through reduced operating and insurance costs, improved energy and resource conservation, reduced compliance and liability charges, improved access to capital, improved customer satisfaction, and improved community and public relations.

33. In the context of these *Guidelines*, "sound environmental management" should be interpreted in its broadest sense, embodying activities aimed at controlling both direct and indirect environmental impacts of enterprise activities over the long-term, and involving both pollution control and resource management elements.

34. In most enterprises, an internal control system is needed to manage the enterprise's activities. The environmental part of this system may include such elements as targets for improved performance and regular monitoring of progress towards these targets.

35. Information about the activities of enterprises and associated environmental impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers, suppliers, contractors, local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest

36. Normal business activity can involve the ex ante assessment of the potential environmental impacts associated with the enterprise's activities. Enterprises often carry out appropriate environmental impact assessments, even if they are not required by law. Environmental assessments made by the enterprise may contain a broad and forward-looking view of the potential impacts of an enterprise's activities, addressing relevant impacts and examining alternatives and mitigation measures to avoid or redress adverse impacts. The *Guidelines* also recognise that multinational enterprises have certain responsibilities in other parts of the product life cycle.

37. Several instruments already adopted by countries adhering to the *Guidelines*, including Principle 15 of the Rio Declaration on Environment and Development, enunciate a "precautionary approach". None of these instruments is explicitly addressed to enterprises, although enterprise contributions are implicit in all of them.

38. The basic premise of the *Guidelines* is that enterprises should act as soon as possible, and in a proactive way, to avoid, for instance, serious or irreversible environmental damages resulting from their activities. However, the fact that the *Guidelines* are addressed to enterprises means that no existing instrument is completely adequate for expressing this recommendation. The *Guidelines* therefore draw upon, but do not completely mirror, any existing instrument.

39. The *Guidelines* are not intended to reinterpret any existing instruments or to create new commitments or precedents on the part of governments -- they are intended only to recommend how the precautionary approach should be implemented at the level of enterprises. Given the early stage of this process, it is recognised that some flexibility is needed in its application, based on the specific context in which it is carried out. It is also recognised that governments determine the basic framework in this field, and have the responsibility to periodically consult with stakeholders on the most appropriate ways forward.

40. The *Guidelines* also encourage enterprises to work to raise the level of environmental performance in all parts of their operations, even where this may not be formally required by existing practice in the countries in which they operate.

41. For example, multinational enterprises often have access to technologies or operating procedures which could, if applied, help raise environmental performance overall. Multinational enterprises are frequently regarded as leaders in their respective fields, so the potential for a "demonstration effect" on other enterprises should not be overlooked. Ensuring that the environment of the countries in which multinational enterprises operate also benefits from available technologies is an important way of building support for international investment activities more generally.

42. Enterprises have an important role to play in the training and education of their employees with regard to environmental matters. They are encouraged to discharge this responsibility in as broad a manner as possible, especially in areas directly related to human health and safety.

## Commentary on Combating Bribery

43. Bribery and corruption are not only damaging to democratic institutions and the governance of corporations, but they also impede efforts to reduce poverty. In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare. Enterprises have an important role to play in combating these practices.

44. Progress in improving the policy framework and in heightening enterprises' awareness of bribery as a management issue has been significant. The OECD *Convention of Combating Bribery of Foreign Public Officials* (the *Convention*) has been signed by 34 countries and entered into force on 15 February 1999. The *Convention*, along with the 1997 revised *Recommendation on Combating Bribery in International Business Transactions* and the 1996 *Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials*, are the core instruments through which members of the anti bribery group co-operate to stop the flow of bribes for the purpose of obtaining or retaining international business. The three instruments target the offering side of the bribery transaction. They aim to eliminate the "supply" of bribes to foreign public officials, with each country taking responsibility for the activities of its companies and what happens on its own territory<sup>2</sup>. A monitoring programme has been established to assure effective and consistent implementation and enforcement of the *Convention*.

45. To address the demand side of bribery, good governance practices are important elements to prevent companies from being asked to pay bribes. In addition, governments should assist companies confronted with solicitation of bribes.

46. Another important development has been the International Chamber of Commerce's recent update of its *Report on Extortion and Bribery in Business Transactions*. The *Report* contains recommendations to governments and international organisations on combating extortion and bribery as well as a code of conduct for enterprises that focuses on these issues.

47. Transparency in both the public and private domains is a key concept in the fight against bribery and extortion. The business community, non-governmental organisations and governments and inter-governmental organisations have all co-operated to strengthen public support for anti-corruption measures and to enhance transparency and public awareness of the problems of corruption and bribery. The adoption of appropriate corporate governance practices is a complementary element in fostering a culture of ethics within the enterprise.

## Commentary on Consumer Interests

48. A brief reference to "consumer interests" was first introduced into the *Guidelines* in 1984, to reflect increasingly international aspects of consumer policies and the impact that the expansion of

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2. For the purposes of the *Convention*, a "bribe" is defined as an "...offer, promise, or giv(ing) of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." The Commentaries to the *Convention* (paragraph 9) clarify that "(s)mall 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. ...."

international trade, product packaging, marketing and sales and product safety can have on those policies. Since that time, the development of electronic commerce and the increased globalisation of the marketplace have substantially increased the reach of MNEs and consumer access to their goods and services. In recognition of the increasing importance of consumer issues, a substantial percentage of enterprises, in their management systems and codes of conduct include references to consumer interests and protections.

49. In light of these changes, and with an eye to helping enhance consumer safety and health, a chapter on *consumer interests* has been added to the *Guidelines* as a result of the current Review. Language in this chapter draws on the work of the OECD Committee on Consumer Policy, as well as that embodied in various individual and international corporate codes (such as those of the ICC), the UN Guidelines on Consumer Policy, and the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce.

50. A variety of consumer protection laws exist that govern business practices. The emerging framework is intended to both protect consumer interests and foster economic growth and places a growing emphasis on the use of self-regulatory mechanisms. As noted, many existing national and international corporate codes of conduct include a reference to some aspect of consumer protection and amplify the commitment of industry to help protect health and safety and build consumer confidence in the marketplace. Ensuring that these sorts of practices provide consumers with effective and transparent protection is essential to help build trust that encourages consumer participation and market growth.

51. The emphasis on alternative dispute resolution in paragraph 3 of the chapter is an attempt to focus on what may in many cases be a more practicable solution to complaints than legal action which can be expensive, difficult and time consuming for everyone involved. It is particularly important that complaints relating to the consumption or use of a particular product that results in serious risks or damages to public health should be resolved in a fair and timely manner without undue cost or burden to the consumer.

52. Regarding paragraph 5, enterprises could look to the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data as a helpful basis for protecting personal data.

### **Commentary on Science and Technology**

53. In a knowledge-based and globalised economy where national borders matter less, even for small or domestically oriented enterprises, the ability to access and utilise technology and know-how is essential for improving firm performance. Such access is also important for the realisation of the economy-wide effects of technological progress, including productivity growth and job creation, within the context of sustainable development. Multinational enterprises are the main conduit of technology transfer across borders. They contribute to the national innovative capacity of their host countries by generating, diffusing, and even enabling the use of new technologies by domestic enterprises and institutions. The R&D activities of MNEs, when well connected to the national innovation system, can help enhance the economic and social progress in their host countries. In turn, the development of a dynamic innovation system in the host country expands commercial opportunities for MNEs.

54. The chapter thus aims to promote, within the limits of economic feasibility, competitiveness concerns and other considerations, the diffusion by multinational enterprises of the fruits of research and development activities among the countries where they operate, contributing thereby to the innovative capacities of host countries. In this regard, fostering technology diffusion can include the commercialisation of products which imbed new technologies, licensing of process innovations, hiring and

training of S&T personnel and development of R&D co-operative ventures. When selling or licensing technologies, not only should the terms and conditions negotiated be reasonable, but MNEs may want to consider the long-term developmental, environmental and other impacts of technologies for the home and host country. In their activities, multinational enterprises can establish and improve the innovative capacity of their international subsidiaries and subcontractors. In addition, MNEs can call attention to the importance of local scientific and technological infrastructure, both physical and institutional. In this regard, MNEs can usefully contribute to the formulation by host country governments of policy frameworks conducive to the development of dynamic innovation systems.

## **Commentary on Competition**

55. These *Guidelines* are intended to emphasise the importance of competition laws and policies to the efficient operation of both domestic and international markets, to reaffirm the importance of compliance with those laws and policies by domestic and multinational enterprises, and to ensure that all enterprises are aware of developments concerning the number, scope, and severity of competition laws and in the extent of co-operation among competition authorities. The term “competition” law is used to refer to laws, including both “antitrust” and “antimonopoly” laws, that prohibit collective or unilateral action to (a) abuse market power or dominance, (b) acquire market power or dominance by means other than efficient performance, or (c) engage in anti-competitive agreements.

56. In general, competition laws and policies prohibit (a) hard core cartels; (b) other agreements that are deemed to be anti-competitive; (c) conduct that exploits or extends market dominance or market power; and (d) anti-competitive mergers and acquisitions. Under the 1998 Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels, C(98)35/Final, the anti-competitive agreements referred to in sub (a) constitute hard core cartels, but the Recommendation incorporates differences in Member countries’ laws, including differences in the laws’ exemptions or provisions allowing for an exception or authorisation for activity that might otherwise be prohibited. These guidelines should not be interpreted as suggesting that enterprises should not avail themselves of such exemptions or provisions. The categories sub (b) and (c) are more general because the effects of other kinds of agreements and of unilateral conduct are more ambiguous, and there is less consensus on what should be considered anti-competitive.

57. The goal of competition policy is to contribute to overall social welfare and economic growth by creating and maintaining market conditions in which the nature, quality, and price of goods and services are determined by market forces except to the extent a jurisdiction considers necessary to achieve other goals. In addition to benefiting consumers and a jurisdiction’s economy as a whole, such a competitive environment rewards enterprises that respond efficiently to consumer demand, and enterprises should provide information and advice when governments are considering laws and policies that might reduce their efficiency or otherwise affect the competitiveness of markets. .

58. Enterprises should be aware that competition laws are being enacted in a rapidly increasing number of jurisdictions, and that it is increasingly common for those laws to prohibit anti-competitive activities that occur abroad if they have a harmful impact on domestic consumers. Moreover, the growth of cross-border trade and investment makes it more likely that anti-competitive conduct taking place in one jurisdiction will have harmful effects in other jurisdictions. As a result, anti-competitive unilateral or concerted conduct that is or may be legal where it occurs is increasingly likely to be illegal in another jurisdiction. Enterprises should therefore take into account both the law of the country in which they are operating and the laws of all countries in which the effects of their conduct are likely to be felt.

59. Finally, enterprises should understand that competition authorities are engaging in more and deeper co-operation in investigating and challenging anti-competitive activity. *See generally:* Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/Final; *Making International Markets More Efficient Through "Positive Comity" in Competition Law Enforcement*, Report of the OECD Committee on Competition Law and Policy, DAF/CLP(99)19. When the competition authorities of various jurisdictions are reviewing the same conduct, enterprises' facilitation of co-operation among the authorities promotes consistent and sound decision-making while also permitting cost savings for governments and enterprises.

## **Commentary on Taxation**

60. Corporate citizenship in the area of taxation implies that enterprises should comply with the taxation laws and regulations in all countries in which they operate, co-operate with authorities and make certain kinds of information available to them. However, this commitment to provide information is not without limitation. In particular, the *Guidelines* make a link between the information that should be provided and its relevance to the enforcement of applicable tax laws. This recognises the need to balance the burden on business in complying with applicable tax laws and the need for tax authorities to have the complete, timely and accurate information to enable them to enforce their tax laws.

61. A member of an MNE group in one country may have extensive economic relationships with members of the same MNE group in other countries. Such relationships may affect the tax liability of each of the parties. Accordingly, tax authorities may need information from outside their jurisdiction in order to be able to evaluate those relationships and determine the tax liability of the member of the MNE group in their jurisdiction. Again, the information to be provided is limited to that which is relevant to the proposed evaluation of those economic relationships for the purpose of determining the correct tax liability of the member of the MNE group. MNEs should co-operate in providing that information.

62. Transfer pricing is another important issue for corporate citizenship and taxation. The dramatic increase in global trade and cross-border direct investment (and the important role played in such trade and investment by MNEs) has meant that transfer pricing tends now to be a significant determinant of the tax liabilities of members of an MNE group. It is recognised that determining whether transfer pricing respects the arm's length standard (or principle) is often difficult both for MNEs and for tax administrations.

63. The Committee on Fiscal Affairs (CFA) of the OECD undertakes ongoing work to develop recommendations for ensuring transfer pricing reflects the arm's length principle. Its work resulted in the publication in 1995 of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines) which was the subject of the Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises (members of an MNE group would normally fall within the definition of Associated Enterprises).

64. The OECD Transfer Pricing Guidelines focus on the application of the arm's length principle to evaluate the transfer pricing of associated enterprises. The Transfer Pricing Guidelines aim to help tax administrations (of both OECD Member countries and non-member countries) and MNEs by indicating mutually satisfactory solutions to transfer pricing cases, thereby minimising conflict among tax administrations and between tax administrations and MNEs and avoiding costly litigation. MNEs are encouraged to follow the guidance in the OECD Transfer Pricing Guidelines, as amended and supplemented, in order to ensure that their transfer prices reflect the arm's length principle.

## COMMENTARY ON THE IMPLEMENTATION PROCEDURES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

1. The Council Decision represents the commitment of adhering countries to further the implementation of the recommendations contained in the text of the *Guidelines*. Procedural guidance for both NCPs and the CIME is attached to the Council Decision.

2. The Council Decision sets out key adhering country responsibilities for the *Guidelines* with respect to NCPs, summarised as follows:

- Setting up NCPs (which will take due account of the procedural guidance attached to the Decision), and informing interested parties of the availability of *Guidelines*-related facilities.
- NCPs in different countries to co-operate with each other as necessary.
- NCPs to meet annually and report to the CIME.

3. The Council Decision also establishes CIME's responsibilities for the *Guidelines*, including:

- Organising exchanges of views on matters relating to the *Guidelines*
- Issuing clarifications as necessary
- Holding exchanges of views on the activities of NCPs
- Reporting to the OECD Council on the *Guidelines*

4. CIME is the OECD body responsible for overseeing the functioning of the *Guidelines*. This responsibility applies not only to the *Guidelines*, but to all elements of the Declaration (National Treatment Instrument, and the instruments on International Investment Incentives and Disincentives, and Conflicting Requirements). In the Declaration, CIME seeks to ensure that each element is respected and understood, and that they all complement and operate in harmony with each other.

5. Reflecting the increasing relevance of the *Guidelines* to countries outside the OECD, the Decision provides for consultations with non-adhering countries on matters covered by the *Guidelines*. This provision allows CIME to arrange periodic meetings with groups of countries interested in *Guidelines* issues, or to arrange contacts with individual countries if the need arises. These meetings and contacts could deal with experiences in the overall functioning of the *Guidelines* or with specific issues. Further guidance concerning CIME and NCP interaction with non-adhering countries is provided in the Procedural Guidance attached to the Decision.

### **I. Procedural Guidance for NCPs**

6. National Contact Points have an important role in enhancing the profile and effectiveness of the *Guidelines*. While it is enterprises that are responsible for observing the *Guidelines* in their day-to-day behaviour, governments can contribute to improving the effectiveness of the implementation procedures. To this end, they have agreed that better guidance for the conduct and activities of NCPs is warranted, including through annual meetings and CIME oversight.

7. Many of the functions in the Procedural Guidance of the Decision are not new, but reflect experience and recommendations developed over the years (e.g. the 1984 Review Report C/MIN(84)5(Final)). By making them explicit the expected functioning of the implementation mechanisms of the *Guidelines* is made more transparent. All functions are now outlined in four parts of the Procedural Guidance pertaining to NCPs: institutional arrangements, information and promotion, implementation in specific instances, and reporting.

8. These four parts are preceded by an introductory paragraph that sets out the basic purpose of NCPs, together with core criteria to promote the concept of “functional equivalence”. Since governments are accorded flexibility in the way they organise NCPs, NCPs should function in a visible, accessible, transparent, and accountable manner. These criteria will guide NCPs in carrying out their activities and will also assist the CIME in discussing the conduct of NCPs.

#### *Core Criteria for Functional Equivalence in the Activities of NCPs*

Visibility. In conformity with the Decision, adhering governments agree to nominate National Contact Points, and also to inform the business community, employee organisations and other interested parties, including NGOs, about the availability of facilities associated with NCPs in the implementation of the *Guidelines*. Governments are expected to publish information about their contact points and to take an active role in promoting the *Guidelines*, which could include hosting seminars and meetings on the instrument. These events could be arranged in co-operation with business, labour, NGOs, and other interested parties, though not necessarily with all groups on each occasion.

Accessibility. Easy access to NCPs is important to their effective functioning. This includes facilitating access by business, labour, NGOs, and other members of the public. Electronic communications can also assist in this regard. NCPs would respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner.

Transparency. Transparency is an important criterion with respect to its contribution to the accountability of the NCP and in gaining the confidence of the general public. Thus most of the activities of the NCP will be transparent. Nonetheless when the NCP offers its “good offices” in implementing the *Guidelines* in specific instances, it will be in the interests of their effectiveness to take appropriate steps to establish confidentiality of the proceedings. Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the *Guidelines*.

Accountability. A more active role with respect to enhancing the profile of the *Guidelines* -- and their potential to aid in the management of difficult issues between enterprises and the societies in which they operate -- will also put the activities of NCPs in the public eye. Nationally, parliaments could have a role to play. Annual reports and annual meetings of NCPs will provide an opportunity to share experiences and encourage “best practices” with respect to NCPs. CIME will also hold exchanges of views, where experiences would be exchanged and the effectiveness of the activities of NCPs could be assessed.

### *Institutional Arrangements*

9. The composition of NCPs should be such that they provide an effective basis for dealing with the broad range of issues covered by the *Guidelines*. Different forms of organisation (e.g. representatives from one Ministry, an interagency group, or one that contained representatives from non-governmental bodies) are possible. It may be helpful for the NCP to be headed by a senior official. NCP leadership should be such that it retains the confidence of social partners and fosters the public profile of the *Guidelines*. NCPs, whatever their composition, are expected to develop and maintain relations with representatives of the business community, employee organisations, and other interested parties.

### *Information and Promotion*

10. The NCP functions associated with information and promotion are fundamentally important to enhancing the profile of the *Guidelines*. These functions also help to put an accent on “pro-active” responsibilities of NCPs.

11. NCPs are required to make the *Guidelines* better known and available by appropriate means, including in national languages. On-line information may be a cost-effective means of doing this, although it should be noted that universal access to this means of information delivery cannot be assured. English and French language versions will be available from the OECD, and website links to the OECD *Guidelines* website are encouraged. As appropriate, NCPs will also provide prospective investors, both inward and outward, with information about the *Guidelines*. A separate provision also stipulates that in their efforts to raise awareness of the *Guidelines*, NCPs will co-operate with a wide variety of organisations and individuals, including, as appropriate, the business community, employee organisations, other non-governmental organisations, and the interested public.

12. Another basic activity expected of NCPs is responding to legitimate enquiries. Three groups have been singled out for attention in this regard: (i) other National Contact Points (reflecting a provision in the Decision); (ii) the business community, employee organisations, other non-governmental organisations and the public; and (iii) governments of non-adhering countries.

### *Implementation in Specific Instances*

13. When issues arise relating to implementation of the *Guidelines* in specific instances, the NCP is expected to help resolve them. Generally, issues will be dealt with by the NCP in whose country the issue has arisen. Among adhering countries, such issues will first be raised and discussed at the national level and, where appropriate, pursued at the bilateral level. This section of the Procedural Guidance provides guidance to NCPs on how to handle such situations. The NCP may also take other steps to further the effective implementation of the *Guidelines*.

14. In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is *bona fide* and relevant to the implementation of the *Guidelines*. In this context, the NCP will take into account:

- the identity of the party concerned and its interest in the matter;
- whether the issue is material and substantiated;
- the relevance of applicable law and procedures;
- how similar issues have been, or are being, treated in other domestic or international proceedings;

- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.

15. Following its initial assessment, the NCP is expected to respond to the party or parties having raised the issue. If the NCP decides that the issue does not merit further consideration, it will give reasons for its decision.

16. Where the issues raised merit further consideration, the NCP would discuss the issue further with parties involved and offer “good offices” in an effort to contribute informally to the resolution of issues. Where relevant, NCPs will follow the procedures set out in paragraph 2a) through 2d). This could include seeking the advice of relevant authorities, as well as representatives of the business community, labour organisations, other non-governmental organisations, and experts. Consultations with NCPs in other countries, or seeking guidance on issues related to the interpretation of the *Guidelines* may also help to resolve the issue.

17. As part of making available good offices, and where relevant to the issues at hand, NCPs will offer, or facilitate access to, consensual and non-adversarial procedures, such as conciliation or mediation, to assist in dealing with the issues at hand, such as conciliation or mediation. In common with accepted practices on conciliation and mediation procedures, these procedures would be used only upon agreement of the parties concerned.

18. If the parties involved fail to reach agreement on the issues raised, the NCP will issue a statement, and make recommendations as appropriate, on the implementation of the *Guidelines*. This procedure makes it clear that an NCP will issue a statement, even when it feels that a specific recommendation is not called for.

19. Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public (see para. 8 in “Core Criteria” section, above). However, paragraph C-4 recognises that there are specific circumstances where confidentiality is important. The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the *Guidelines*. It is understood that proceedings include the facts and arguments brought forward by the parties. Nonetheless, it remains important to strike a balance between transparency and confidentiality in order to build confidence in the *Guidelines* procedures and to promote their effective implementation. Thus, while para. C-4 broadly outlines that the proceedings associated with implementation will normally be confidential, the results will normally be transparent.

20. As noted in para. 2 of the “Concepts and Principles” chapter, enterprises are encouraged to observe the *Guidelines* wherever they operate, taking into account the particular circumstances of each host country.

- In the event *Guidelines*-related issues arise in a non-adhering country, NCPs will take steps to develop an understanding of the issues involved. While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities. Examples of such steps could include contacting the management of the firm in the home country, and, as appropriate, government officials in the non-adhering country.
- Conflicts with host country laws, regulations, rules and policies may make effective implementation of the *Guidelines* in specific instances more difficult than in adhering countries. As noted in the commentary to the General Policies chapter, while the *Guidelines*

extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.

- The parties involved will have to be advised of the limitations inherent in implementing the *Guidelines* in non-adhering countries.
- Issues relating to the *Guidelines* in non-adhering countries could also be discussed at NCP annual meetings with a view to building expertise in handling issues arising in non-adhering countries.

## *Reporting*

21. Reporting would be an important responsibility of NCPs that would also help to build up a knowledge base and core competencies in furthering the effectiveness of the *Guidelines*. In reporting on implementation activities in specific instances, NCPs will comply with transparency and confidentiality considerations as set out in para. C-4.

## **II. Procedural Guidance for the CIME**

22. The Procedural Guidance to the Council Decision provides additional guidance to the Committee in carrying out its responsibilities, including:

- Discharging its responsibilities in an efficient and timely manner
- Considering requests from NCPs for assistance
- Holding exchanges of views on the activities of NCPs
- Providing for the possibility of seeking advice from experts

23. The non-binding nature of the *Guidelines* precludes the Committee from acting as a judicial or quasi-judicial body. Nor should the findings and statements made by the NCP (other than interpretations of the *Guidelines*) be questioned by a referral to CIME. The provision that CIME shall not reach conclusions on the conduct of individual enterprises has been maintained in the Decision itself.

24. CIME will consider requests from NCPs for assistance, including in the event of doubt about the interpretation of the *Guidelines* in particular circumstances. This paragraph reflects paragraph C-2c) of the Procedural Guidance to the Council Decision pertaining to NCPs, where NCPs are invited to seek the guidance of the CIME if they have doubt about the interpretation of the *Guidelines* in these circumstances.

25. When discussing NCP activities, it is not intended that CIME conduct annual reviews of each individual NCP, although the CIME will make recommendations, as necessary, to improve their functioning, including with respect to the effective implementation of the *Guidelines*.

26. A substantiated submission by an adhering country or an advisory body that an NCP was not fulfilling its procedural responsibilities in the implementation of the *Guidelines* under the Decision, or acting consistently with regard to the procedures followed in its handling of specific instances, will also be considered by the CIME. This complements provisions in the section of the annex pertaining to NCPs reporting on their activities.

27. Clarifications of the meaning of the *Guidelines* at the multilateral level would remain a key responsibility of the CIME to ensure that the meaning of the *Guidelines* would not vary from country to country. A substantiated submission by an adhering country or advisory body with respect to whether an NCP interpretation of the *Guidelines* is consistent with CIME interpretations will also be considered. This

may not be needed very often, but would provide a vehicle to ensure consistent interpretation of the *Guidelines*.

28. Finally, the Committee may wish to call on experts to address and report on broader issues (e.g. child labour, human rights), or individual issues, or to improve the effectiveness of procedures. For this purpose, CIME could call on OECD in-house expertise, international organisations, the advisory bodies, NGOs, academics, and others. It is understood that this will not become a panel to settle individual issues.